(2)

No. 01-424

Supreme Court, U.S.
FILED
OCT 10 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RAINBOW CONSTRUCTION COMPANY, A PARTNERSHIP; RCMC, INC. d/b/a RAINBOW CONSTRUCTION COMPANY; PETER A. RICHARDSON; DOUGLAS V. ANDERSON; CLIFFORD MICHAEL MCCLURE; HELON L. CHICHESTER; JAMES LAMBERT; AND CHRISTIAN HANS WEISSLEDER,

Petitioners,

v.

RICHARD ROBERT RADCLIFFE; CHARLES MELVIN TAYLOR; ANDREW SLIVKA, JR.; AND JAY STREETS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

SANDRA RAE BENSON *
MICHAEL B. ROGER
VAN BOURG, WEINBERG, ROGER & ROSENFELD
A Professional Corporation
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600

* Counsel of Record

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether tort claims for false arrest, false imprisonment, and malicious prosecution are preempted by the National Labor Relations Act ("NLRA") where it is mere speculation that a court would consider the NLRA in rendering a decision as to liability, and in the event such consideration were deemed necessary, it would be ancillary to the primary issues raised by the personal injury claims.

2. Whether petitioners failed to present to the Ninth Circuit the issue of NLRA preemption of California Penal Code § 602(n), thus rendering the issue inappropriate for Supreme Court review.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
JURISDICTION	1
STATEMENT OF THE CASE	1
I. OVERVIEW	1
II. FACTUAL BACKGROUND	2
REASONS FOR DENYING THE WRIT	4
I. PETITIONERS' QUESTIONS PRESENT NO CONFLICT BETWEEN CIRCUITS AND THE RELEVANT ISSUE AFFECTS ONLY A SMALL NUMBER OF CASES	4
II. THIS COURT HAS ACKNOWLEDGED THAT THE STATES HAVE A PRIMARY RIGHT TO REGULATE ACCESS TO PROPERTY AND HAS REJECTED A PREVIOUS PREEMPTION CHALLENGE TO CALIFORNIA'S TRESPASS STATUTE	5
A. Rainbow simply does not agree with California's policy of broad access to property for labor activities	5
B. This Court specifically has rejected Rainbow's assertion that California's trespass statute is preempted	7
III. THE NINTH CIRCUIT'S ANALYSIS, AND ITS CONCLUSION THAT THE SUBJECT TORTS ARE NOT PREEMPTED, ADHERE TO ALL U.S. SUPREME COURT DECISIONS CONSTRUING THE DOCTRINE OF *GARMON* PREEMPTION	11

TABLE OF CONTENTS—Continued

Page

A. Because the focus of a court's inquiry in addressing the state tort claims would not be identical to the focus of an NLRB inquiry, preemption is unwarranted. 11

B. California has a right and an obligation to protect its residents from the personal injuries attendant to false arrest, false imprisonment, and malicious prosecution, therefore, preemption is unwarranted. 14

C. Preemption of the 42 U.S.C. § 1983 claim does not control preemption of the state torts. 15

D. Petitioners' confound *Garmon* and § 301 preemption doctrines when they argue that the state torts are "artfully pled" unfair labor practices. 16

IV. CALIFORNIA'S LABOR EXEMPTION TO ITS TRESPASS STATUTE DOES NOT DENY EMPLOYERS ACCESS TO THE NLRB 17

V. BECAUSE NLRA PREEMPTION OF CALIFORNIA'S TRESPASS STATUTE WAS NOT AN ISSUE BEFORE THE NINTH CIRCUIT, IT IS NOT PROPERLY BEFORE THIS COURT 18

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 19
Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 13
Bristol Farms, 311 N.L.R.B. 437, 143 L.R.R.M. 1217 (1993) 6
Bud Antle v. Barbosa, 35 F.3d 1355 (9th Cir. 1994) 13
Carroll v. United States, 354 U.S. 394 (1957) 19
Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975) 13
Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, et al., 430 U.S. 290 (1977) 11, 14
G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) 19
Hayden v. Reickerd, 957 F.2d 1506 (9th Cir. 1991) 13
Indio Grocery Outlet, 323 N.L.R.B. No. 196, 155 L.R.R.M. 1210 (1997) 6
Johnson & Hardin Co., 305 N.L.R.B. 690 (1991), *enf'd*, 49 F.3d 237 (6th Cir. 1995) 6
Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) 14
Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) 6, 9
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 11, 14
Local 926, Int'l. Union of Operating Engineers v. Jones, 460 U.S. 669 (1983) 13
NLRB v. Calkins, 187 F.3d 1080 (9th Cir. 1999) ... 6
O'Neil's Markets dba Food for Less, 318 N.L.R.B. 646, 150 L.R.R.M. 1128 (1995), *aff'd in relevant part*, 95 F.3d 733 (8th Cir. 1996) 6

TABLE OF AUTHORITIES—Continued

Page

Radcliffe v. Rainbow, 254 F.3d 772 (9th Cir. 2001) 2
Ramsay v. Steeltech Manufacturing, Inc., 895 F. Supp. 225 (E.D. Wis 1995) 17
San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) ..... *passim*
Sears, Roebuck & Company v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) ..... *passim*
TKO Fleet Enterprises, Inc. v. District 15 International Association of Machinist & Aerospace workers, AFL-CIO, 72 F. Supp. 2d 83 (E.D. N.Y. 1999) 17
Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) 5
Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) 11

STATE CASES

Agricultural Labor Relations Board v. Superior Ct., 16 Cal. 3d 392 (1976) 6
In re Catalano, 29 Cal. 3d 1 (1981) ..... *passim*
In re Lane, 71 Cal. 2d 872 (1969) 6
Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, 61 Cal. 2d 766 (1964) 6, 9
Sears, Roebuck & Company v. San Diego County District Council of Carpenters, 25 Cal. 3d 317 (1979) ..... *passim*
In re Zerbe, 60 Cal. 2d 666 (1964) 6

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES	Page
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1257(a)	1
29 U.S.C. § 185	16, 17
29 U.S.C. § 160(j)	18
42 U.S.C. § 1983	15, 18
STATE STATUTES	
Cal. Code Civ. Proc. § 527.3	8
Cal. Labor Code § 923	6
Cal. Penal Code § 602(n)	*passim*

JURISDICTION

Petitioners invoke Supreme Court jurisdiction pursuant to 28 U.S.C. § 1257(a), which provides discretionary review of "[f]inal judgments or decrees rendered by the highest court of a State." The Ninth Circuit is not the highest court of the State of California, nor was its June 13, 2001 decision, affirming in part, reversing in part, and remanding, a final judgment or decree. Therefore, 28 U.S.C. § 1254(1) seems the appropriate basis for United States Supreme Court jurisdiction in the present case.

STATEMENT OF THE CASE

I. OVERVIEW

California's trespass statute excludes from the rights it confers on property owners the right to exclude from their property "persons engaged in lawful union activities" permitted by state and federal labor laws. Cal. Penal Code § 602(n). Petitioners ask the Court to find that Congress has abridged the right of California to exclude persons engaged in "lawful union activities" from the purview of its own criminal trespass laws. Property rights are quintessential matters of state law and California has a long history, based primarily on the right of free speech granted by its own Constitution, of allowing union activity to take precedence over property rights. Yet, in the name of federal labor law, Petitioners argue that the State of California must allow employers to imprison, arrest, and prosecute for trespass union representatives who peacefully enter their property to conduct safety inspections and check for prevailing wage violations.

Petitioners' theories for the preemption they seek are unsupported by California or federal law. This Court has found that state trespass statutes are not preempted by federal labor law except where they interfere with federal rights guaranteed by the National Labor Relations Act. *See Sears,*

Roebuck & Company v. San Diego County District Council of Carpenters, 436 U.S. 180, 197 (1978). The legislative history of the state labor exemption shows that the statute is to be construed in harmony with the NLRA. Thus, Petitioners' effort to fabricate a potential conflict between California and federal law based on California's tolerance of lawful union activities on private property is unpersuasive.

II. FACTUAL BACKGROUND

Respondents incorporate by reference the Factual Background section from the Ninth Circuit decision in this matter (254 F.3d 772, Pet. at 4a-10a) as a factual overview of the events leading to this petition. Additionally, Respondents supplement the facts asserted by Petitioners as follows:

Petitioners describe at length the factual background of their citizen's arrests of Respondents Richard Radcliffe, Charles Taylor, Andrew Slivka, and Jay Streets ("Business Agents" or "Union Representatives") and the consequent criminal prosecution. Petitioners omit, however, one crucial fact: there has never been, at any stage of this six-year litigation, any allegation or evidence that the Business Agents were engaged in any unlawful conduct on the public construction sites at issue here.

No one ever has claimed that the Business Agents disrupted the work in any way or engaged in any destruction of property. Petitioners have not advanced a theory concerning how the Business Agents' conduct could have been prohibited under the NLRA. Thus, there is no evidence that the Business Agents' activities fell outside California's exemption of "lawful labor union activities" from its trespass statute.

Petitioners place unwarranted emphasis on the fact that the Business Agents refused to specify their intended activities to the employer whose operation they were investigating (see Pet. at 6, 7). In reality, the Business Agents' activities were

not a mystery to any of the parties. The record below is replete with evidence that the employer, the public owners of the sites, and the police all knew and understood that the Business Agents were monitoring Rainbow's non-compliance with health and safety regulations and California's prevailing wage statutes.[1]

Although Petitioners state "[t]here were no union subcontractors or union represented employees present at the construction sites on the days the arrests were made," they fail to inform the Court that Rainbow had retained union subcontractors signatory to the Carpenters' Master Collective Bargaining Agreement to perform portions of the work. (ER 723 at p. 69:10-70:2, ER 724 at p. 75:21-76:4, ER 725 at p. 126:13-22, ER 789:13-24). Thus, the Union Representatives knew that members they represented would be working on

---

[1] Examples of evidence concerning Rainbow's knowledge of the nature of the activities: (ER 770:9 - 771:4; ER 771:9 - 772:4; ER 635 at ¶ 9; ER 159-160) (prior to the arrests and based on information gleaned from public record requests and job site inspections, the Union Representatives had filed numerous good faith complaints with the California Labor Commissioner, the EPA, and OSHA concerning the Rainbow public works jobsites); (ER 307-308) (Rainbow's letter indicating knowledge that Union Representatives had entered construction jobsites to conduct inspections and "verify compliance with prevailing wage law"); prior to the arrests, due to Union Representatives' formal complaints (*e.g.*, ER 159-160), Rainbow had been assessed penalties for failure to pay prevailing wages at public works jobsites (*e.g.*, ER 163); (ER 811 at pp. 619-20) (prior to one of the arrests, a California OSHA Inspector visiting Rainbow regarding a complaint recalled that Rainbow President Richardson had said he was expecting such a visit because other agencies had already been there "in regards to a complaint by the union" about asbestos exposure). Likewise, the owners of the sites knew the intended purpose of the inspections because the Union Representatives had informed them prior to the visits. Finally, the Union Representatives had visited the police station before the visits and had made known their intentions.

these jobsites at some point during the construction. (ER 789:13-24).

The Carpenters' Master Agreement contains a specific provision guaranteeing unrestricted union access to jobsites. (ER 937-939) ("Union representatives shall be permitted *at all times* upon any place or location where any work covered by this Agreement *is being, has been or will be* performed.") (emphasis added). Thus, the Union Representatives enjoyed both a statutory (Cal. Penal Code § 602(n)) and a contractual right to perform lawful union activities on the Rainbow job sites.

After several prior visits that did not result in arrests, Rainbow effected citizen's arrests of the Union Representatives on two consecutive occasions. Each time the charging deputy district attorneys declined to prosecute determining that the Union Representatives' actions were not criminal in nature based on California's statutory (Penal Code § 602(n)) and case law (*e.g.*, *In re Catalano*, 29 Cal.3d 1 (1981)). It was after the third arrest, and a personal visit to the Mendocino County district attorney by Rainbow's president, that the prosecution for these entries was begun. After a lengthy criminal trial, the Union Representatives were acquitted of criminal trespass.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' QUESTIONS PRESENT NO CONFLICT BETWEEN CIRCUITS AND THE RELEVANT ISSUE AFFECTS ONLY A SMALL NUMBER OF CASES.

The Union Representatives are aware of, and Petitioners have cited, no state laws, in California or other states, which present the same or an analogous issue to that which Petitioners raise here. The fact that Petitioners provide no evidence of any analogous issue in any other forum narrows

the predicted "conflict" raised by this preemption issue to the class of cases arising in California, wherein persons engaged in lawful labor union activities on private property are falsely arrested on trespass charges, falsely imprisoned while on the private premises, and maliciously prosecuted for the unwarranted trespass charge.[2] Petitioners have presented no evidence that the incidence of this type of case is high in California. Counsel for the Union Representatives in this action have been in practice as a union-side labor firm in California since 1958. Respondents' counsel assert that such a case would arise only under a rare combination of circumstances.

II. THIS COURT HAS ACKNOWLEDGED THAT THE STATES HAVE A PRIMARY RIGHT TO REGULATE ACCESS TO PROPERTY AND HAS REJECTED A PREVIOUS PREEMPTION CHALLENGE TO CALIFORNIA'S TRESPASS STATUTE.

A. Rainbow simply does not agree with California's policy of broad access to property for labor activities.

It is universally acknowledged, even by Petitioners (Pet. at 12, fn.5), that states retain certain rights to regulate access to property within their boundaries and may expand access for labor activities beyond the minimums dictated by the NLRA.[3]

---

[2] Indeed, this case does not even present an issue of *private* property since the property at issue was *public* property and California clearly has a right to regulate access to public property in the State.

[3] *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n. 21 (1994) (state property law creates interest entitling employers to exclude [nonemployee union representatives] in the first instance—where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1) of the NLRA); *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436

The State of California has a long history, based primarily on the right of free speech granted its citizens by its own Constitution and codified state public policy,[4] of allowing union activity to take precedence over naked property rights.[5] The enactment of Penal Code § 602(n) in 1978 is a manifestation of this state policy.

U.S. 180, 198 (1978); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992); *Bristol Farms*, 311 NLRB 437, 143 LRRM 1217 (1993) (employer cannot prohibit activity in shopping center where California law provides right of free speech on such property); *Indio Grocery Outlet*, 323 NLRB No. 196, 155 LRRM 1210 (1997) (under California law, store owner has no right to exclude union members from walkway in front of store); *enf'd as NLRB v. Calkins*, 187 F.3d 1080, 1088 (9th Cir. 1999); *O'Neil's Mkts. dba Food for Less*, 318 NLRB 646, 150 LRRM 1128 (1995), *aff'd in relevant part*, 95 F.3d 733, 738-39 (8th Cir. 1996) (burden on employer to establish interest in property entitling it to exclude those entering property under claim of Section 7 right); *Johnson & Hardin Co.*, 305 NLRB 690 (1991), *enf'd*, 49 F.3d 237 (6th Cir. 1995) (employer lacking right to exclude others violates Section 8(a)(1) when it removes Section 7 actors).

[4] The individual worker must "have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Cal. Labor Code § 923.

[5] *See, e.g., Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal.2d 766 (1964) (peaceful union picketing in privately owned shopping center not trespassory); *In re Lane*, 71 Cal.2d 872 (1969) (union hand billing on private sidewalk in front of store not trespassory); *Agricultural Labor Relations Bd. v. Superior Ct.*, 16 Cal.3d 392 (1976) (state statutory and administrative law may authorize access and organizing on a private employer's property); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 25 Cal.3d 317 (1979)(peaceful union picketing in privately owned shopping center not trespassory); *In re Zerbe*, 60 Cal.2d 666 (1964) (union official positioned in railroad right-of-way in connection with picketing was not trespassing).

Petitioners dislike California's legislatively and judicially mandated preference for concerted activity over private property rights. They wish to convince this Court that it is impossible for a state, without infringing on the exclusive jurisdiction of the NLRB, to determine its own balance between labor's right to free expression and a property holder's right to prevent that free expression on his or her land. As decisions by this Court, the NLRB, and the California courts show, the doctrine of *Garmon* [6] preemption does not dictate a divestment of the State's fundamental right to define its own property laws.

B. This Court specifically has rejected Rainbow's assertion that California's trespass statute is preempted.

This Court and the California Supreme Court foreclosed Rainbows' assertion that the state trespass law is preempted by the NLRA more than twenty years ago. In *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Court determined that California's trespass statute, which, at that time did not include § 602(n) as it now appears, was not preempted by the NLRA under the circumstances of a labor dispute. The Court decided that

> permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected [under the NLRA] does not create an unacceptable risk of interference with conduct, which the Board, and a court reviewing the Board's decision, would find protected.

---

[6] *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

Sears, 436 U.S. at 205. Finding no significant risk of interference with federal labor policy, this Court remanded the trespass action to the California Supreme Court for further proceedings.

This Court's prediction that no conflict would arise has been borne out in *Sears* and subsequent cases. On remand, in *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 25 Cal.3d 317 (1979), the California Supreme Court held explicitly that Penal Code § 602(n), (which had become effective January 1, 1979), merely codified already existing law and noted that "union activity protected by state or federal law clearly does not violate any subdivision of Penal Code 602." *Id.* at 330, fn.9. The court held that "the decisions of the United States Supreme Court and of this court recognize that the State of California, by statute or by judicial decision, may permit union activity on private premises." *Id.* at 328. Relying on the State's Moscone Act (Code of Civ. Pro. § 527.3), and prior state court decisions, the court decided that peaceful picketing on a privately owned sidewalk did not constitute a trespass because it was "lawful activity" as a matter of state law. *Id.* at 325-28. Thus, despite the reference to the NLRA in the state's trespass statute, neither state court construction of the NLRA, nor any conflict with any Board decision arose.

Likewise, in a later construction of § 602(n), the California Supreme Court based its construction of California's access regulations *solely* on California labor policy, statutes, and case law. *In re Catalano* presented facts identical to this case: Carpenters' Union representatives, who were policing the selfsame collective bargaining agreement as that at issue in this case, entered a construction site to inspect safety conditions and prepare a shop steward's report. When they refused to leave upon request by an agent of the landowner, they were arrested and convicted of trespassing. *In re Catalano*, 29 Cal.3d at 3.

The California Supreme Court held that whether a union official's entry on a private site is trespassory or not "turns simply on whether [the] conduct was 'lawful' activity within the meaning of our decisions in *Schwartz-Torrance* [*Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal.2d 766 (1964)] and *Sears* [*Roebuck & Company v. San Diego County District Council of Carpenters*, 25 Cal.3d 317 (1979)], and thus exempt from prosecution under section 602." *In re Catalano*, 29 Cal.3d at 14. The court looked to "[1] customary and accepted practices of the construction industry, and to [2] a balance of the respective interests of the union and the landowner" to determine that the disputed conduct therein was "lawful union activity." *Id.* at 14-15. No construction of the NLRA was required or attempted, no conflict engendered.

As shown above, the State of California consistently has turned to its own Constitution, labor law, and case law to determine any issues presented by the enforcement of the trespass statute and its labor activity exemption. The Ninth Circuit was clearly correct in opining that there was little realistic risk of interference with the Labor Board's primary jurisdiction due to the inclusion of the phrase "permitted under the NLRA" in the trespass exemption. The court's conclusion was based on the fact that "the Board ordinarily leaves to the State the question of whether non-employee union activity may be conducted on the employer's property."[7] Pet. at 25a, citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992).

---

[7] Petitioners mistakenly attributed to the Ninth Circuit the view that "in classes of cases involving trespass, California is free to devise its own rules as to what constitutes 'lawful union activity' under the NLRA." Pet. at 11. This was not the court's reasoning. The Ninth Circuit's statement was that California was free to determine what a union representative must say to an employer when entering private property, because in doing so it was construing its own law (not the NLRA), which already provides

Rainbow's contention that the California Legislature wrote the "trespass law in a manner that requires a state court to interpret the NLRA *without deference to the NLRB*" (Pet. at 19 (emphasis added)) is designed to raise the illusory specter of potential conflict. In fact, Rainbow's contention conflicts with both documented legislative intent and with the California Supreme Court's interpretation of the statute. As shown above, California's Supreme Court actually interpreted the statute's reference to the NLRA as recognition of federal law's supremacy in this arena. *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 25 Cal.3d at 331, fn.9; *see also In re Catalano*, 29 Cal.3d at 13-14.

Likewise, the statute's legislative history reveals that the California Assembly expressly dictated that the code was to be "construed . . . pursuant to the decisions of the Agricultural Labor Relations Board and the National Labor Relations Board" to prevent "a local judge from interposing his or her judgment as to what constitutes a labor union activity."[8]

The California Legislature's inclusion of the NLRA in the state statute was not meant to supplant its wisdom for that of the NLRB in determining what is or is not lawful union business. Instead, the California Legislature deferred, codified, and recognized that the NLRA provided additional rights to union representatives to enter private property, and that, as such, the California Legislature would be in conflict with those rights if it criminalized such an entrance on private property as trespass. Speculation that a conflict might arise is unwarranted.

---

more access to union representatives than required under the NLRA pursuant to *Lechmere*. Pet. at 25a.

[8] Charles R. Imbrecht (sponsor), Letter to Chief Clerk of the Assembly of 1978 (8/31/78); Charles R. Imbrecht, Letter to Honorable Edmund G. Brown, Governor of California (9/15/78).

III. THE NINTH CIRCUIT'S ANALYSIS, AND ITS CONCLUSION THAT THE SUBJECT TORTS ARE NOT PREEMPTED, ADHERE TO ALL U.S. SUPREME COURT DECISIONS CONSTRUING THE DOCTRINE OF *GARMON* PREEMPTION.

A. Because the focus of a court's inquiry in addressing the state tort claims would not be identical to the focus of an NLRB inquiry, preemption is unwarranted.

This Court repeatedly has held that the NLRA does not necessarily preempt state tort laws that implicate the NLRA. *See, e.g., Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (defamation not preempted); *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, et al*, 430 U.S. 290 (1977) (intentional infliction of emotional distress not preempted); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (state laws prohibiting violence not preempted). The question for preemption purposes is whether state court jurisdiction over a claim will unduly interfere with the federal administration of national labor policies. *Farmer*, 430 U.S. at 300, explaining *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959). The mere fact that the same conduct gives rise both to state tort claims and unfair labor practice charges does not mean the state claims are preempted. *See Farmer*, 430 U.S. at 303-04. As long as the legal question to be decided under state law is not the same as the issue that would be decided by the NLRB, the state is not divested of jurisdiction. *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S.180, 197 (1978). Petitioners concede this standard applies to the analysis of the issues in this case. Pet. at 14.

In this case, the Union Representatives entered the job sites to look for violations of laws that require contractors to provide safe and healthful working conditions for their

employees and to determine Rainbow's compliance with the State's prevailing wage statutes on public works. They were arrested by the Petitioners and allegedly subjected to wrongful and baseless criminal prosecution for engaging in this lawful union activity. The state torts arising here are false arrest, false imprisonment, and malicious prosecution.

Under this scenario, the Board's analysis of a potential unfair labor practice is not identical to a court's analysis of the torts at issue. The question before the Board would be whether Rainbow had interfered with the Union Representatives' protected § 7 rights to engage in the health and safety and prevailing wage inspections, or (depending on which party filed the charge), whether the Union Representatives had violated § 8(b) of the Act by entering the property in pursuit of some unlawful objective. Contrarily, a court's inquiry would focus on whether Rainbow had violated the Union Representatives' state-protected right to be free from arrest without probable cause and had maliciously caused the Union Representatives to be subjected to a baseless criminal prosecution.[9]

---

[9] Petitioners insist that the courts would be forced to consider the nature of the alleged trespassers' conduct and whether that conduct would be permitted under the NLRA. Petitioners' contention is speculation. The California Legislature did not define the Penal Code § 602(n) labor exemption as a *defense* to trespass; the trespass statute simply does not apply to the labor conduct. Therefore, any property owner accused of false arrest may be required to prove affirmatively that he had probable cause to believe the arrestee's conduct was forbidden by the NLRA or some other law at the time of the arrest. *See In re Catalano*, 29 Cal.3d at 15 (if a union representative goes beyond the scope of lawful union activity by interfering with the construction work or damaging the property, the owner may properly insist that he or she leave). Under this scenario, the court's primary focus would be the alleged false arrestor's *knowledge* of the union representatives' conduct before the citizen's arrest was effected—there need be no analysis of the union representatives' conduct nor its status under the NLRA.

Rainbow argues that the Union Representatives' claims will "turn on whether . . . they were 'engaged in lawful union activities'," and that this is identical to what would be the Board's focus. Pet at 15. This artful use of the phrase "turns on" obscures the state of the law. Under the case law, "identical" means "identical." *See, e.g., Sears*, 436 U.S. 180 (where court's focus would be on location of picketing and Board's focus would be on object of picketing, issues are not identical); *Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1983) (where Board's focus would be infringement of strikers' rights and court's focus would be misrepresentations to replacement workers, controversies cannot fairly be called identical); *Local 926, Int'l. Union of Operating Engineers v. Jones*, 460 U.S. 669, 882 (1983) (where Board's focus would be whether union caused the employee's discharge and court's focus would be whether union's actions caused interference with employee's contractual relationship, issues can be said to be identical).

As stated above, a court's inquiry would focus on whether Rainbow had violated the Union Representatives' right to be free from arrest without probable cause and malicious prosecution. The mere fact that a court may look to NLRB case law to resolve a question does not necessitate preemption. To the extent that a court must consider federal labor law at all, it is clearly a collateral issue and would fall within the well-recognized "collateral issue" exception to *Garmon* preemption. *See Garmon*, 359 U.S. at 243; *Bud Antle v. Barbosa*, 35 F.3d 1355, 1361 (9th Cir. 1994); *Hayden v. Reickerd*, 957 F.2d 1506, 1512 (9th Cir. 1991). This exception derives from the doctrine that federal courts may decide labor questions that emerge as collateral issues in litigation based on independent legal obligations. *See Connell*

Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616, 626 (1975).[10]

B. California has a right and an obligation to protect its residents from the personal injuries attendant to false arrest, false imprisonment, and malicious prosecution, therefore, preemption is unwarranted.

The legal significance of the state's interest in protecting its citizens from tortious conduct is paramount where the alleged injury "touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of power to act." *Garmon*, 359 U.S. at 243-44; *see also Farmer*, 430 U.S. at 304 ("the potential for interference [with the federal labor scheme] is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens").

Rainbow cites *Linn v. Plant Guard Workers*, 383 U.S. at 64 ("The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, undercuts the ordinary arguments for preemption") but fails to grasp its import. Where, as here, an adjudication by the Board that the employer had engaged in an unfair labor practice and an injunction prohibiting such activities in the future would provide little redress to individuals who suffered the personal indignities attendant to arrest, lengthy prosecution, and the threat of incarceration.

On this score, the Ninth Circuit was justified in recognizing the state law torts of false imprisonment, false arrest, and malicious prosecution as matters of local responsibility,

---

[10] *Garmon* preemption applies both to state and federal courts. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982).

peripheral to the concerns of the NLRA. The Board would have no concern about the personal injuries resulting from such actions but would involve itself only with the interference with the Union Representatives' protected activities. The means of the interference, *i.e.*, by false arrest, imprisonment, and lengthy unwarranted prosecution, would be irrelevant.

C. Preemption of the 42 U.S.C. § 1983 claim does not control preemption of the state torts.

Petitioners express incredulity that the Ninth Circuit could reach differing conclusions as to the preemption of the § 1983 claims and the state torts. Pet. at 10, 18. Petitioners have confused the Ninth Circuit's analysis of the various preemption issues presented to it. Although Petitioners imply that each of the Union Representatives' § 1983 claims were found to be preempted by the NLRA, in fact, the Circuit Court allowed the § 1983 claims against the governmental entities to stand (Pet. at 11a),[11] as well as the § 1983 claims predicated on constitutional violations as against all defendants, including Rainbow (Pet. at 13a-14a).[12] *Only* the § 1983 claim predicated on deprivation of rights under § 7 of the NLRA as against *Rainbow* was found preempted (Pet. at 11a-13a).

The reasoning that led to the preemption of the § 1983 claim does not, however, dictate the preemption of the state torts. The § 1983 claim based on the deprivation of the Union

---

[11] The § 1983 claims against the governmental entities fell due to the district attorney's prosecutorial immunity and a lack of evidence for the alleged conspiracy. Pet. at 14a-17a. The claims were not preempted.

[12] The Union Agents' constitutional claims against Rainbow fell because the Ninth Circuit found insufficient evidence of a conspiracy with a state actor—a requirement for stating a § 1983 claim against a private individual. Pet. at 17a-20a. The § 1983 claims against Rainbow were found legally insufficient—not preempted.

Representatives' § 7 rights by the employer was preempted under *Garmon* because the legal question to be decided by the court was identical to the issue that would have been decided by the NLRB, *i.e.*, whether Rainbow had interfered with the Union Representatives' rights under § 7. The Union Representatives' effort to cast a straight-out unfair labor practice charge as a § 1983 violation fell to the NLRB's exclusive jurisdiction over such issues.

Contrarily, the claims addressing the *means* by which the interference was accomplished, *i.e.*, false arrest, imprisonment, and malicious prosecution, are not preempted. The means Rainbow employed to effect the interference constituted personal injuries to the Union Representatives. As stated above, these personal injuries would not be addressed by the Board, would not present identical questions to the Board as to a court, and "touch[] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of power to act." *Garmon*, 359 U.S. at 243-44. Thus, the reasoning dictating the § 1983 claim's preemption simply does not lead to the identical conclusion with regard to the state tort claims.

D. Petitioners' confound *Garmon* and § 301 preemption doctrines when they argue that the state torts are "artfully pled" unfair labor practices.

Rainbow blurs concepts drawn from cases interpreting *Garmon* and Section 301 (29 U.S.C. § 185) preemption. For example, Rainbow invokes the "artful pleading" doctrine which applies to Section 301 preemption but has never been applied to *Garmon* preemption. Pet. at 19 fn.9. Rainbow's complaint that the Ninth Circuit's decision enables unions to recharacterize an unfair labor practice charge as a state court claim might also be made with respect to all state torts that

can be characterized as unfair labor practices. But this Court and others have long since recognized that state jurisdiction should not be ousted with respect to compelling local interests involving injury to persons including violence, defamation, and intentional infliction of emotional distress. This case involves precisely such injury to individuals who were subjected to imprisonment, arrest, and prosecution that they claim was unlawful.

In rejecting removal under *Garmon* preemption, courts have repeatedly ruled that *Garmon* preemption is a defense, not a basis for recharacterizing state law torts as "artfully pled" federal causes of action (as is § 301). *See, e.g., Ramsay v. Steeltech Mfg., Inc.*, 895 F.Supp. 225 (E.D. Wis 1995) (unlike § 301 preemption, Garmon preemption does not create jurisdiction in federal courts—if Garmon applies both state and federal courts lack jurisdiction); *see also TKO Fleet Enterprises, Inc. v. District 15 Int'l Assn of Machinist & Aerospace workers, AFL-CIO*, 72 F.Supp. 2d 83, 87 (E.D. N.Y. 1999) (collecting cases). Petitioners' confusion of the two analytical legal frameworks does no service to this Court's inquiry.

IV. CALIFORNIA'S LABOR EXEMPTION TO ITS TRESPASS STATUTE DOES NOT DENY EMPLOYERS ACCESS TO THE NLRB.

Rainbow's dire predictions of the consequences if the Ninth Circuit's decision is allowed to stand are equally mistaken. Rainbow asserts that the Ninth Circuit's decision "denies California employers any means of accessing the NLRB's jurisdiction to determine whether a union's activity on the employer's California property is protected or prohibited under the NLRA." Pet. at 21. This is erroneous. The employer is free to bring a charge before the Board and obtain precisely such adjudication. Rainbow writes that "[i]f an employer tries to enjoin a trespass, a union can cite

California Penal Code § 602(n) and have the state determine whether, in its view, the NLRA would permit such conduct." Why an employer who wants adjudication by the Board would seek an injunction in state court is a mystery. The NLRB is empowered by Section 10(j) (29 U.S.C. § 160(j)) to seek an injunction in federal court against union activity prohibited under the Act. Such an injunction is enforceable by contempt proceedings. The employer would have the benefit of the injunction until the Board could adjudicate the unfair labor practice charge, at which point the Board would decide upon the final remedy. The alleged dilemma of California employers being forced to submit questions of interpretation of the NLRA to California courts is imaginary.

V. BECAUSE NLRA PREEMPTION OF CALIFORNIA'S TRESPASS STATUTE WAS NOT AN ISSUE BEFORE THE NINTH CIRCUIT, IT IS NOT PROPERLY BEFORE THIS COURT.

This Court should deny Petitioners' request that the Court review the validity of California's trespass statute. Before the Ninth Circuit, Petitioners argued *only* that the Union Representatives' 42 U.S.C. § 1983 and state tort claims are preempted by the NLRA. A general preemption of California's exemption from its trespass statute for "persons engaged in lawful labor union activity" (Cal. Penal Code § 602(n)) was not properly an issue before that court,[13] and therefore, is not properly before this Court.

Petitioners' "Statement of Issues" before the Ninth Circuit included two preemption issues, neither implicating § 602(n) generally:

> 2. Is Appellants' federal claim against Rainbow, brought pursuant to 42 U.S.C. § 1983 and alleging an

[13] Petitioners had proffered the issue at the trial level on a Rule 12(b)(6) motion, which was denied.

underlying violation of rights under Section 7 of the NLRA, within the primary jurisdiction of the National Labor Relations Board?

3. Are Appellants' state law causes of action for false arrest and malicious prosecution preempted by the NLRA, in that they necessarily require litigation of an alleged unfair labor practice, and are premised on an interpretation of California Penal Code § 602(n), which purportedly expands union rights of access under the NLRA in California? [14]

The Ninth Circuit squarely addressed these two preemption issues in rendering its decision. *See* Pet. at 10a-14a (concerning the § 1983 claims) and Pet. at 20a-26a (concerning the state tort claims). That court did not, however, address a general preemption of the state trespass statute, because that issue had not been raised.

This Court routinely has rejected cases where the petitioner has failed to raise the presented issue or issues to the court of appeals. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Carroll v. United States*, 354 U.S. 394 (1957). This course should be followed in the present case as well.

---

[14] Amended Brief of Appellee Rainbow Construction Company (filed 9/22/99) at 5-6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SANDRA RAE BENSON *
MICHAEL B. ROGER
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
A Professional Corporation
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600

* Counsel of Record

Counsel for Respondents